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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

AUG 11 1967

DENNIS MAXWELL,

Petitioner-Appellant,

vs.

JOHN W. TURNER, Warden,
Utah State Prison,

Respondent.

Clk. Supreme Court, Utah

Case No.
10924

BRIEF OF RESPONDENT

Appeal from the Judgment of the District Court of the
Second Judicial District, in and for Weber County
Honorable Charles G. Cowley, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

DENNIS MAXWELL,

Petitioner-Appellant,

vs.

JOHN W. TURNER, Warden,
Utah State Prison,

Respondent.

Case No.
10924

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Dennis Maxwell, appeals from the denial of the relief prayed for in his petition for a Writ of Habeas Corpus.

DISPOSITION IN LOWER COURT

The appellant filed his petition for a Writ of Habeas Corpus in the District Court of the Second

Judicial District, in and for Weber County. A hearing was held on April 24th, 1967, before the Honorable Charles G. Cowley, judge presiding. Appellant was present in person and by his counsel, Paul D. Vernieu. Testimony was taken. At the conclusion of the hearing, the court having found no evidence of any impropriety resulting in appellant's entering a plea of guilty to the charge, entered an order denying the relief prayed for in the Petition for the Writ of Habeas Corpus.

RELIEF SOUGHT ON APPEAL

Respondent submits the decision of the trial court should be affirmed.

STATEMENT OF FACTS

On or about January 10th, 1962, appellant was the subject of a burglary investigation by Weber County Sheriff, Leroy Hadley (Tr. 5). The initial interrogation in this matter took place at appellant's home (Tr. 5, 49). After talking to him in his home, the sheriff decided to take appellant into custody (Tr. 10). Appellant was then taken to the jail in Ogden, along with a hi-fi set that was part of the property involved in the burglary under investigation. He appeared the following morning in the city court and was charged with second degree burglary (Tr. 7, 52). At his appearance in the city court, appellant requested time to retain counsel and the case was set over so that he might

do so (Tr. 7). Immediately following his appearance in the city court, appellant posted his bail and then went to the sheriff's office for further investigation (Tr. 8, 52). The appellant's appearance in the city court and his subsequent meeting with Sheriff Hadley occurred on the same day, on or about January 11th, 1962.

Appellant's next court appearance was in the District Court for the Second Judicial District on February 5, 1962 (Tr. 24). He had not retained counsel in the interim, apparently having decided to plead guilty. On that date, appellant was advised of his right to counsel. He was examined thoroughly by the court as to whether or not he wanted counsel (Tr. 25). He then knowingly and intelligently waived his right to counsel (Tr. 25). The court then informed him that it would not be necessary for him to enter a plea at that time. However, appellant preferred to waive the waiting period and entered a plea of guilty to the charge of second degree burglary (Tr. 26, 27). Sentencing was postponed pending investigation by the Utah State Board of Adult Probation and Parole (Tr. 28).

The defendant appeared in the district court for sentencing on February 19th, 1962, at which time he was sentenced to the Utah State Prison for the period provided by law. Other pertinent facts will be mentioned in the argument portion of this brief.

ARGUMENT

POINT I

THE RECORD REVEALS NO EVIDENCE THAT APPELLANT'S WAIVER OF COUNSEL AND ENTRY OF A PLEA OF GUILTY WAS THE RESULT OF IMPROPER COERCION, MISREPRESENTATION, OR INDUCEMENT ON THE PART OF LAW ENFORCEMENT OFFICIALS.

Both of appellant's arguments, viz., that he was denied the right to counsel, and that he was improperly induced to enter a plea of guilty, are predicated on his allegations that statements made by John Holmes, a probation officer, and Sheriff Hadley, caused appellant to believe he would get probation in return for his plea of guilty. Thus, his two arguments resolve into a question of whether or not such inducement did, in fact, occur.

Respondent submits that John Holmes, the probation officer, could have had nothing to do with inducing appellant to plead guilty. It is conclusively established in the record that appellant entered his plea of guilty on February 5th, 1962 (Tr. 24). Reason tells us that any inducement would have to occur prior to the time of the entry of a plea. Yet, appellant admits on cross-examination that he did not talk to John Holmes prior to February 5th.

Q. (By Mr. Newey) So John Holmes certainly couldn't have induced you to plead guilty when

you didn't talk to him about the case until after you had entered your plea on February 5th; isn't that true?

A. Yes, sir. (Tr. 31)

* * *

Q. After February 5th that you talked to Mr. Holmes. So that anything Mr. Holmes said couldn't have induced you to plead guilty; isn't that true?

A. Uh, huh. (Tr. 34)

Respondent submits that for this reason the allegation that appellant was induced to plead guilty by John Holmes has no basis in fact and is therefore without merit. In view of this admission, this court need not consider the possibility of inducement by Mr. Holmes.

There remains then, only the possibility that Sheriff Leroy Hadley could have influenced appellant to enter his plea of guilty. Respondent submits that if, in fact, appellant was wrongly induced to enter his plea of guilty, a release on habeas corpus would be appropriate. *Behrens v. Hironimus*, 166 F.2d 245 (4th Cir. 1948); *Piner v. United States*, 222 F.2d 199 (7th Cir. 1955). However, the burden of proving the inducement rests on the petitioner for habeas corpus. *Behrens v. Hironimus*, 170 F.2d 627 (4th Cir. 1948); *Gensburg v. Smith*, 35 Wash. 2d 849, 215 P.2d 880 (1950), cert. den. 340 U.S. 835 (1950). If the petitioner in a habeas corpus petition urging wrongful inducement of his plea

fails to prove that allegation, the writ will not be granted.

There is a presumption that the proceedings as shown by the record at the time of conviction were regular. *United States ex rel Giesel v. Claudy*, 96 F. Supp. 201 (W.D. Pa. 1951); *Hall v. Edmondson*, 177 Kan. 404, 279 P.2d 290 (1955). In order to warrant his release on the habeas corpus, petitioner must put in sufficient evidence to overcome this presumption. *Nunn v. Humphrey*, 79 F. Sup. 8 (M.D. Pa. 1948); *White v. Hudspeth*, 166 Kan. 63, 199 P.2d 518 (1948). With these rules in mind, respondent submits that appellant has failed in his proof of his allegations of inducement. It is well settled that the unsupported and uncorroborated statements of a petitioner in habeas corpus will not suffice to carry his evidentiary burden. *Kanive v. Hudspeth*, 165 Kan. 658, 198 P.2d 162 (1948). Nowhere in the record is there any testimony to support petitioner's allegations of inducement. On the contrary, said allegations are refuted in whole by both John Holmes and Sheriff Hadley. Both the probation officer and Sheriff Hadley flatly denied having ever made promises of probation to the appellant in return for a plea of guilty from him (Tr. 46, 61).

If we assume, however, for the purposes of this argument that Sheriff Hadley did in fact promise the defendant that he would get probation in exchange for his plea of guilty, in light of the record here, respondent submits that this would not have influenced

appellant to enter a plea of guilty. There can be no wrongful inducement when the person claiming to have been induced knows as a fact at the time that the person making a promise has no authority whatsoever to make such a promise. *Ex parte Hall*, 91 Okla. Crim. 11, 215 P.2d 587 (1950); *State v. Terry*, 30 N.J. Super. 288, 104 A.2d 332 (1954); *Commonwealth ex rel Campbell v. Ashe*, 141 Pa. Super. 408, 15 A.2d 409 (1940). In this case, appellant admits in his testimony at the hearing that he had knowledge of the fact that the Sheriff had no authority to make promises, nor could he enforce any promises as to whether or not appellant would receive probation.

Q. (By Mr. Newey) Have you been on probation before?

A. Yes, sir.

Q. When you were put on probation before, were you put on probation by the Sheriff?

A. No, sir.

Q. Were you put on probation by the probation department?

A. No, sir.

Q. Who put you on probation when you went on before?

A. A judge.

Q. Now did you understand Mr. Hadley to say, as you say: "He promised me definitely that I would get probation?" You knew Mr. Hadley didn't give probation; didn't you?

A. This is true. (Tr. 35)

Thus, it is clearly apparent that even had Sheriff Hadley made the statements alleged to have been made by him, appellant was not influenced or induced in any way, for the reason that he knew that whatever promises the sheriff might make could not be made authoritatively.

CONCLUSION

Respondent submits that the record on appeal clearly and adequately refutes all of petitioner's allegations. It could hardly be argued that any statements by John Holmes made after entry of plea had an effect on appellant's plea. That he could not have been influenced by John Holmes is all too obvious. With respect to Sheriff Hadley, it is likewise apparent that whatever he may have said had no effect on appellant since he knew that the sheriff had no authority to make any promises to him. Appellant has based his claim of coercion on statements made by the probation officer and the sheriff at the time of his arrest and conviction. When, by his own testimony, appellant clearly and convincingly disproves his allegations, respondent submits that the only course for this court to follow is to affirm the decision of the trial court.

Respectfully submitted,

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